

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor

September 9, 2009

BY U.S. MAIL

[REDACTED]
Washington, DC 200

Re: Freedom of Information Act Appeal

Dear [REDACTED]

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code, 2001 Ed. § 2-531 *et seq.* (the "D.C. FOIA"), dated May 21, 2009 (the "Appeal"). In your FOIA Request dated June 21, 2007, you sought "[A]ccess to the Holder Report archives – the documents and interviews on which is based the, "Summary of Investigation Reported to the Board of Directors of the District of Columbia Water and Sewer Authority" conducted under the direction of Eric H. Holder, Jr. of Covington and Burling" (FOIA Request). The District of Columbia Water and Sewer Authority ("WASA") responded to your FOIA Request by letter dated August 10, 2007, notifying you the materials you sought are in the possession of Mr. Holder at Covington & Burling and "[W]ASA is not required to retrieve from third parties documents not maintained by the agency." Subsequently, a series of communications were exchanged between both parties in an attempt to resolve Appellant's FOIA Request, particularly as it related to gaining access to the Holder Report Archives. When these efforts became fruitless, this Appeal was filed.

In response to the filing of this Appeal, by letter dated August 12, 2009, this Office requested WASA and Appellant provide us with supplemental briefs on the issue of whether WASA has authority to release the Holder Report or the accompanying investigative materials ("Holder Archives") or both. We also requested WASA and Appellant to brief us on the nature of the relationship between Mr. Holder, Covington & Burling, and WASA.

Appellant responded to our supplemental brief requested by letter dated August 13, 2009. In its response, Appellant sought to establish the Holder Report was prepared on WASA's behalf and WASA maintains control of access to these materials. Appellant also made reference to a telephone conversation held with Mr. Holder where he allegedly indicated permission to view the materials rested with WASA.

WASA responded to our supplemental brief request by letter dated August 19, 2009. In its response, WASA stated the relationship between itself and Mr. Holder was established after its Board of Directors passed a resolution authorizing an independent investigation regarding elevated lead test results. Regarding possession and control of the Holder Report or Holder Report Archives, WASA stated they never took possession or control of these materials to insure the report's independent status. WASA further argued they do not have access to these materials because they were produced and stored by a private law firm nor are they under the custody or control of WASA. Therefore, their position is these materials are not subject to production under FOIA.

Discussion

It is the public policy of the District government that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." *Id.* § 2-531. In aid of that policy, the DC FOIA creates the right "to inspect ... and ... copy any public record of a public body" *Id.* at § 2-532(a). Yet that right is subject to various exemptions, which may form the basis for a denial of a request. *Id.* at § 2-534.

The remaining issue on appeal is whether the Holder Archives are "public records." The D.C. FOIA defines "public records" to include "[A]ll books, papers, maps, photographs, cards, tapes; recordings, or other documentary materials, regardless of physical form or characteristics prepared, owned, used in the possession of, or retained by a public body. . . ." (emphasis added) *Id.* at § 2-502(18). Under the D.C. FOIA, WASA is required to disclose the Holder Archives if they were "prepared," "owned," "used in the possession of," or "retained by" WASA. Based solely on the record before us, the Holder Archives are not "public records" because the Holder Archives were not "prepared," "owned," "used in the possession of," or "retained by" WASA. Nor are the Holder Archives in the possession of WASA.

From the beginning, WASA was only concerned with procuring the Holder Report and not the underlying investigative materials that may have been compiled by Mr. Holder and Covington & Burling to complete the report. The record does not suggest WASA ever requested the Holder Archives. WASA's position has remained unchanged since the launch of this investigation. This is evident from the statement Glenn S. Gerstell, Chairman of the WASA Board, made when he stated "[W]e are looking forward to his [Mr. Holder's] report and recommendations." See Press Release, WASA, WASA Board Retains Law Firm to Review Management of Elevated Lead Levels In Water (March 4, 2004) (<http://dcwatch.com/wasa/040304.htm>). Gerstell's statement gives added weight to WASA's position on appeal that they never intended to take possession of the Holder Archives; rather, they were only interested in the final Holder Report.

Scott A. Hodes
September 9, 2009

Because we are not a court of law with the ability to conduct formal discovery in this matter, we must rely on the record before us, including reasonable assertions made by each party. WASA's position is reasonable and without direct evidence to the contrary, we see no reason to undercut their position on Appeal. Accordingly, we are satisfied the Holder Archives are not "public records" nor are they in the possession of WASA, so we UPHOLD WASA's decision and your Appeal is hereby DISMISSED.

If you are dissatisfied with this decision, you are free under the DC FOIA to commence a civil action against the District of Columbia government in the District of Columbia Superior Court.

Regards,

A handwritten signature in dark ink, appearing to read "Chip Richardson", with a large, stylized flourish extending to the right.

Andrew T. "Chip" Richardson, III
General Counsel to the Mayor